STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDGAR LEE GLOVER,

Defendant-Appellant.

UNPUBLISHED
June 17, 1997

No. 193334
Recorder's Court
LC No. 95-002309

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to five years in prison for his second felony-firearm conviction. The trial court imposed a consecutive enhanced sentence of ten to fifteen years in prison for the assault conviction because of defendant's status as an habitual offender, third offense, pursuant to MCL 769.11(1); MSA 28.1083(1). We affirm.

Defendant contends that the trial court abused its discretion by allowing the prosecution to present evidence that defendant threatened complainant two weeks before the assault. Complainant had told the police that defendant was selling drugs at the apartment building where both defendant and complainant lived. Defendant argues that the evidence was highly prejudicial and had little probative value. We disagree. The evidence was relevant and was admitted for the proper purpose of showing that defendant had a motive to harm complainant and that he intended to do so. Defendant's threat to complainant occurred so close in time to defendant's assault on complainant that they blended into one event such that proof of the threat explained the circumstances of the assault. It was thus necessary for the jury to hear testimony about the threat to get the "complete story" about the assault. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

Defendant further argues that the trial court erred by refusing to read CJI2d 7.20, Burden of Proof - Self-Defense, to the jury. We disagree. The trial court thoroughly instructed the jury about the

elements of self-defense and told the jury that "the defendant doesn't have to prove that he acted in self-defense; the burden is on the prosecutor to prove any fact that he didn't act in self-defense." Although we have recommended that the language of the criminal jury instructions be used when possible to assist the jury in properly determining whether a defense has been established, we have never mandated that these jury instructions be used. *People v Robinson*, 79 Mich App 145, 160-161; 261 NW2d 544 (1977). Indeed, the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). The trial court's instruction to the jury that the prosecution had the burden of proving that defendant did not act in self-defense properly stated the burden of proof, fairly presented to the jury the issues to be tried and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996); *People v Prather*, 121 Mich App 324, 330; 328 NW2d 556 (1982).

Next, defendant argues that the trial court abused its discretion by not allowing his attorney to conduct recross-examination of the investigating police officer. The officer had testified on redirect that complainant's version of the events surrounding the assault corresponded with the officer's observations of the assault scene. When defendant's attorney started to ask the officer about his observations, the trial court stopped him, saying that no new subject matter had been raised.

We conclude that the trial court acted within its discretion to prevent testimony on irrelevant and collateral matters. *People v Von Everett*, 156 Mich App 615, 623; 402 NW2d 773 (1986). Defendant's attorney's questions were directed not toward the officer's credibility, but toward the officer's assessment of complainant's credibility. The jury, not the officer, was responsible for determining complainant's credibility. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). Further, as the trial court determined, the officer was perfectly capable of observing the assault scene and determining which bullets made which holes. Finally, defendant's testimony, as well as complainant's, supported the officer's observations that apparent bullet holes bent the glass in the apartment building fire door toward complainant's apartment, and apparent shotgun shots bent the glass toward the stairway where defendant was standing. The trial court did not abuse its discretion in preventing defendant's attorney from questioning the officer about an irrelevant and collateral issue. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995); *Von Everett, supra* at 623.

Defendant also argues that the prosecution failed to produce sufficient evidence of his intent to do great bodily harm to complainant to support his conviction for assault with intent to do great bodily harm less than murder. We disagree. The elements of the crime of assault with intent to do great bodily harm less than murder are: (1) an attempt or offer with force or violence to do corporeal hurt to another (an assault); (2) coupled with an intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). The requisite intent may be inferred from the act itself, the means employed, and the manner employed. *People v Leach*, 114 Mich App 732, 735; 319 NW2d 652 (1982). The harm or injury intended must be serious and of an aggravated nature. *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922).

Complainant and his wife were awakened by a fire outside their apartment door at about 1:00 a.m. on December 5, 1994. When complainant went out to extinguish the fire and clean up the mess it

made, he saw defendant. Complainant and defendant had a loud altercation over the cause of the fire. Defendant moved toward on complainant, then retreated when complainant went into his apartment. Defendant returned to his own apartment, got a nine-millimeter pistol, went into the stairway next to complainant's apartment, and started shooting at complainant through the stairway fire door. The shots missed complainant by only a couple of inches. Although complainant fired back at defendant and chased him up to the apartment building's third floor, he testified that he did so only to protect himself and his family from defendant's shots. Viewing the evidence in the light most favorable to the prosecution, we hold that the prosecution presented sufficient evidence of defendant's intent to harm complainant to sustain defendant's conviction. *Lugo, supra* at 710; *People v Head,* 211 Mich App 205, 210; 535 NW2d 563 (1995). Defendant's argument on this issue is nothing more than an attempt to attack the credibility of the prosecution's witnesses on appeal. However, the jury already determined that the prosecution's witnesses were credible, a determination that we will not disturb. *Velasquez, supra* at 16.

Finally, defendant argues that his ten- to fifteen-year prison sentence for the assault with intent to do great bodily harm conviction, as enhanced by his habitual third-offender status, is disproportionate. We disagree. Defendant's maximum sentence is within the limits imposed by MCL 769.11(1)(a); MSA 28.1083(1)(a). The longest term that can be imposed for a first time conviction of assault with intent to do great bodily harm is ten years under MCL 750.84; MSA 28.279, and defendant's maximum sentence of fifteen years is less than twice that.

The facts of this case establish that the trial court did not abuse its discretion in sentencing defendant to an enhanced sentence of ten- to fifteen years in prison for the assault with intent to do great bodily harm conviction. As recently stated in *People v Hansford (After Remand),* ___ Mich ___ (Docket No. 104770, issued May 13, 1997):

> [A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. [Slip op at 6.]

Defendant had prior felony convictions for assault with intent to do great bodily harm less than murder, felony-firearm, and attempted carrying of a pistol in a motor vehicle. Considering the facts of this case in conjunction with defendant's prior record, we conclude that the trial court did not abuse its sentencing discretion. *Hansford, supra*.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad